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No. 547

In the Supreme Court of the United States

OCTOBER TERM, 1958

DAVID BOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 6, 1958. The petition for a writ of certiorari was filed on December 1, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was probable cause for issuance of the search warrant.

2. Whether petitioner was sufficiently advised of the nature of the charges against him.

3. Whether the evidence showed affirmative acts by petitioner sufficient to sustain the charge that he willfully attempted to evade and defeat the tax in question.

4. Whether the trial court erred in refusing to define the term "bookmaker".

STATUTES INVOLVED

26 U. S. C., Supp. V, 4401 provides:

> (a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U. S. C., Supp. V, 4421 provides:

For purposes of this chapter—

> (1) Wager.—The term "wager" means—
>
> (A) Any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,
>
> * * * * *

26 U. S. C., Supp. V, 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000 or im-

prisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was convicted in the District Court for the District of Minnesota of attempting to evade and defeat wagering excise taxes owed by him. The indictment was in two counts, covering the periods from July 1, 1955, to June 30, 1956, and from July 1, 1956, to February 27, 1957, respectively. Sentence was suspended on the conviction under the first count and petitioner was placed on probation for five years. On the second count petitioner was sentenced to imprisonment for a year and a day and a fine of $5,000 (R. 10–13, 159–160, 161–165).[1] The evidence may be summarized as follows:

1. Numerous witnesses testified to placing bets in substantial amounts with petitioner on baseball, football and basketball games during the period covered by the indictment.[2] Payment was made either in

[1] "R" refers to Volumes I and II of the record, which are consecutively paged. "Supp. R." refers to Appellee's Supplemental Record in the Court of Appeals.

[2] Government witnesses testified to placing bets with petitioner as hereafter indicated:

Martin M. Weinar, bets during the 1956 football season totaling between $2,500 and $3,000 (R. 48).

Joe F. Blindman, bets during 1955 totaling between $60,000 and $75,000 (R. 50).

Thomas Buchanan, bets during the 1955 football season totaling approximately $800 (R. 53).

Anthony J. Couri, bets during the 1955 football season, $6,000 to $8,000; during the 1955–1956 basketball season, around $20,000; during the 1956 football season, $8,000 to $9,000 (R. 75).

Samuel Golden, who first placed personal bets with petitioner,

cash or in cashier's checks payable to the bettor, indorsed by him and transmitted to petitioner (R. 50, 55–57, 75–76, 173–187, Supp. R. 24–25, 80). Petitioner would receive bets on either side of a contest (R. 35, 101). Petitioner settled periodically with the larger bettors (R. 36, 47, 50, 75).

Petitioner, in applications for insurance, gave his occupation as "Bookmaker" (R. 58, 61, 189–199). On his income tax returns, however, petitioner gave his occupation as "Gambling (Dice and Cards)" (R. 231, 243). On petitioner's 1956 income tax return he claimed deductions for business expenses as follows (R. 251–259):

Rent, Plaza Hotel	$1,350.00
Rent, The Sands, Las Vegas	117.35
Telephones	4,646.81
Ticker service	450.00
Gorham Press Service	1,300.00
Gorham schedules	250.00
Total	$8,114.16

Petitioner had a sports ticker in his hotel suite (R. 71, 72). He was seen on frequent occasions with known gamblers (Supp. R. 41, 52–53, 58, 59, 61–62, 64–65, 76). Petitioner operated at the Park Plaza Hotel in Minneapolis under various fictitious names (R. 69–71, 64–67, 207–231). Two unlisted direct line telephones were installed in his suite (R. 67, 70, 209).

later received them for petitioner, who paid him $50 to $75 per week. Golden testified that the bets he received for petitioner ran to about $200 a game during the 1955 World Series, about $1,500 to $2,000 a week during the 1955 football season and between $2,500 and $3,000 a week during the 1956 football season (R. 26–35).

It was stipulated that during the period covered by the indictment petitioner did not pay any federal wagering taxes or file any wagering tax returns, nor did he buy the occupational tax stamp in the amount of fifty dollars required of those in the business of accepting wagers (R. 78).

Prior to the period covered by the indictment petitioner had been informed of the requirements of the law in this respect by Internal Revenue agents, who personally visited him on May 6, 1952 (R. 81–82) and further gave him written notice that he was keeping inadequate records for income tax purposes (R. 98, 262–264). Thereafter he kept a record purportedly covering such matters (Government Exhibits 23, 24 and 25). The first entry in Government Exhibit 23 reads:

> First gamble since receiving notice to keep better records from Agent Radford. Was in Minneapolis Recreation Parlor at four-o-clock and won $2.75 betting on a pool game that was going on.

These exhibits purport to show a running account of wagering transactions, with a continuing total figure, which was later transferred to petitioner's income tax returns, but do not set forth transactions with any of the individuals named *supra*, at pp. 3–4, fn. 2 (R. 85–90, 231–235, 243–247).

2. The United States Commissioner issued a number of search warrants for the search of various persons and places, including petitioner's residence (R. 7–9). The warrant authorized search for "all books,

memoranda, records, correspondence and covers relating to and used in the business of bookmaking and of accepting and of receiving wagers in such business on the above described premises * * *" (R. 8). Supporting the application for search warrants were a number of affidavits showing numerous long distance calls to and from petitioner's telephone (Supp. R. 31–34, 48–51, 60–70), many of which were to known gamblers (Supp. R. 29–30, 32, 34, 38–40, 43–44, 46–47, 70, 71, 72–74); registered mail sent to petitioner by known gamblers (Supp. R. 53, 73–74); surveillance by officers, which showed petitioner's close association with known gamblers (Supp. R. 41, 52, 58, 59, 61–62, 64–65, 76); the fact that he maintained a sports ticker at his hotel suite (Supp. R. 81); petitioner's admission to government agents that his income was in part derived from wagers on sporting events (Supp. R. 72), although his 1955 income tax return showed his business as "Gambling (Dice and Cards)"; and the fact that petitioner had not registered or paid the occupational wagering tax (Supp. R. 79). Among the records seized under the warrant were Government Exhibits 23, 24 and 25 (see p. 5, *supra*) purporting to be annual records of petitioner's wagering transactions.

ARGUMENT

1. The existence of such a large amount of intercommunication between petitioner and known gamblers, the maintenance of a sports ticker at petitioner's hotel suite, petitioner's admission to Internal Revenue agents that his income was in part derived

from wagers on sports events although his income tax returns failed to show income from that source, as well as other circumstances discussed *supra,* at page 6, were sufficient to justify a finding of probable cause for the issuance of a search warrant. A reasonably discreet and prudent man would be led to believe that a business of accepting wagers was being conducted by petitioner at these premises. Indeed, in the language of Mr. Justice Stone, "Absence of a well-grounded belief that such was the fact could be ascribed only to a lack of intelligence or a singular lack of practical experience on the part of the officer." *Dumbra* v. *United States*, 268 U. S. 435, at 441. Governments Exhibits 23, 24 and 25, purporting to keep a running account of such wagers, was sufficiently described by the search warrant, which included all books and records relating to the business of accepting wagers on the premises (R. 8). It may be assumed that the agents could not know prior to the seizure whether the books were an accurate or inaccurate account of the business, but in either event they were an instrumentality of the wagering business. Section 4901 of 26 U. S. C., Supp. V, provides that "No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering) * * * until he has paid the special tax therefor." See also 26 U. S. C., Supp. V, 4413. Since petitioner had not paid this tax it was unlawful for him to be so engaged and the books were subject to seizure under a warrant as instruments of the crime. See *Marron* v. *United States*, 275 U. S. 192, holding that books could be seized without a warrant.

2. The indictment was sufficient to enable petitioner to prepare his defense and there was no error in refusing the demand for a bill of particulars.

(a) It is claimed that the indictment does not charge where the offense was committed. Both counts of the indictment charge that petitioner "in the City of Minneapolis, State and District of Minnesota, did wilfully and knowingly attempt to evade and defeat the said wagering excise tax due" (R. 11, 12). That was the venue proved.

(b) It is further claimed that the indictment was insufficient in that it did not inform petitioner as to whether he was being charged with being associated with others in the alleged business. But petitioner was not charged with causing the crime to be committed by others. The only evidence which even tended in that direction was to the effect that petitioner paid one Golden, a government witness, fifty to seventy-five dollars a week for a time to receive bets at his cigar store. Golden was only a temporary employee not implicated in the charge of evading the wagering excise tax. Cf. *United States* v. *Calamaro*, 354 U. S. 351.

(c) Nor does the law require, as contended, that the amount of the tax due be stated. The government voluntarily filed a bill of particulars stating that the total amount of excise due was unknown, but that the government expected to prove that, on Count I, approximately $10,000 tax was due on gross wagers in the approximate amount of $100,000 and, on Count II, a tax of approximately $5,000 on gross wagers of approximately $50,000 (R. 24–25). The gist of the

offense is the attempt to evade. The amount of the tax due is in no way important so long as the amount is substantial, which was plainly evident in this case. *United States* v. *Nunan*, 236 F. 2d 576, 585 (C. A. 2).

The indictment here was amply sufficient to apprise petitioner of every element of the charge made against him and to bar any subsequent prosecution for the same offense. *Haynes* v. *United States*, 285 U. S. 427, 431. The court did not abuse its discretion in denying the motion for particulars. *Wong Tai* v. *United States*, 273 U. S. 77, 82.

3. Petitioner's contentions that the government failed to prove affirmative acts on his part sufficient to show that he attempted to evade and defeat the tax and, further, that the court's instructions on this point were insufficient, are without substance. *Spies* v. *United States*, 317 U. S. 492, relied upon by petitioner, did not hold that the evidence of affirmative acts of evasion was insufficient, but only that the court had failed to instruct on the matter. It was pointed out, 317 U. S. at 499, that such an attempt might be inferred from keeping a double set of books, making false entries, covering up sources of income, or any conduct the likely effect of which would be to mislead or conceal. This kind of evidence was abundantly supplied here, where petitioner failed to record bets amounting to a large sum, operated under assumed names, required payment in cash or in checks which did not bear petitioner's name, and made his income tax returns in such a manner as to conceal information which would reveal his liability for the wagering excise tax.

The court charged that the gist of the offense was to evade or defeat the ten percent excise tax imposed on wagers; that this included an intent to evade payment of a tax known to be due *and some act done in furtherance of the intent;* that such acts might be shown by engaging in business under false and fictitious names, entering false and misleading information as to the business of the taxpayer on his income tax return, keeping incomplete records of income and business transactions, making false and misleading entries and avoiding the keeping of records usually kept or required by law (R. 148–149). The charge more than adequately covered the subject matter of petitioner's requested Instruction VII (R. 107) and well stated the law as set forth in *Spies* v. *United States, supra.* Immediately, after refusing to define "bookmaking" for the jury in response to its request for such definition (see *infra*), the court called the jury's attention to its mission, to find out whether petitioner was engaged in accepting wagers and "whether or not he committed an affirmative act, acts of commission as distinguished from acts of omission which would indicate his intent to seek to avoid the payment of his just tax willfully" (R. 156).

4. The trial court did not err in refusing petitioner's requested Instruction V[3] or in failing to define

[3] The requested instruction read as follows (R. 106): "* * * To be engaged in business of accepting wagers, one must hold himself out to the public as one who will accept wagers on the results of both sides of sports events or contests. These persons are commonly referred to as 'bookmakers.' To be a bookmaker, one makes a public quoting and offering of odds, with the soliciting of bets, and induces the public to take chances with him

"bookmaker" and placing of "bets on both sides" when definition of those terms was requested by the jury (R. 154–156). Whatever may be the merits of the definition contained in requested Instruction V in a jurisdiction where gambling is legal, it is certainly not accurate in a state such as Minnesota, where gambling is illegal and there can scarcely be a holding "out to the public." As the court pointed out to the jury, the question under this statute was not whether petitioner was a bookmaker, but whether he was engaged in the business of accepting wagers, which might be somewhat more narrow. *Kahn* v. *United States*, 251 F. 2d 160 (C. A. 9), certiorari denied, 356 U. S. 918. The jury was adequately instructed as to the occupation named in the statute (R. 154–156).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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on contests and events; the passing of money or property, and the resulting win or loss on the transaction. The term 'bookmaker' comes from the keeping of a book or paper to record the wager (Words & Phrases)."

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